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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962
No. 222

Case No. 17235

PENSICK & GORDON, INC., *Appellant,*

vs.

CALIFORNIA MOTOR EXPRESS, *et al.*, *Appellees.*

Case No. 17380

PENSICK & GORDON, INC., a California corporation, *Appellant,*

vs.

CALIFORNIA MOTOR EXPRESS, LIMITED, a corporation, *et al.*, *Appellees.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Case No. 17380

PENSICK & GORDON, INC., a California corporation, *Appellant,*

vs.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Pensick & Gordon, Inc., the petitioner herein (plaintiff and appellant below), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit filed and entered in the above-entitled consolidated causes on 13 April, 1962.

Opinions Below.

The opinion of District Judge Byrne dismissing the complaint in No. 17235[1] for lack of jurisdiction is

[1]Where necessary to distinguish for clarity, the cause and appeal in No. 17235 will be referred to as the "First Cause" and "First Appeal" and those in No. 17380 will be referred to as the "Second Cause" and "Second Appeal," respectively.

unreported, but appears in the printed transcript of the record of the appeal in said cause [1 Tr. 94].[2] Judge Byrne rendered no opinion in support of his order dismissing the first amended complaint (the second cause); the court's order in this respect appears in the printed transcript of record of the second appeal [2 Tr. 194]; the transcript of the oral argument which preceded this order, however, does give some indication of the court's thinking in this respect [2 Tr. 210-279, at pp. 248-254, 258-261, 264-266, 275-279]. The opinion of the Court of Appeals is as yet unreported, but is printed and attached hereto as Appendix "A".

Grounds for Jurisdiction.

The District Court, pursuant to appropriate motions, dismissed the complaint in the first cause [1 Tr. 94] and the first amended complaint in the second cause [2 Tr. 194] for want of jurisdiction in each instance; The Court of Appeals affirmed these orders by its opinion in the consolidated appeals, erroneously, we submit. Review of these orders by this court is accordingly sought under 28 U. S. C. A., §1254(1).

The judgment of the Court of Appeals is dated 13 April, 1962 and was filed and entered the same date; no rehearing was sought or granted, nor has any order been sought or granted for an extension of time within which to petition for certiorari.

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[2]Page references to the printed transcript of record in the "First Appeal" will be preceded by the designation "1 Tr."; that in the "Second Appeal," "2 Tr." These printed transcripts have been forwarded by the Clerk of the Court of Appeals in accordance with Rule 21(4).

Questions Presented.

Two questions of major importance to the transportation industry, as well as to those sectors of the national economy dependent upon interstate motor common carriers for service, are ultimately involved in the instant causes: first, are federally certificated motor common carriers immune to damage suits by shippers? second, if shippers do, in fact, still retain private rights of action against such carriers for breach of the duty to serve are those rights barred or affected by the circumstance of a picket line at the shipper's place of business?

The immediate questions specifically presented are the following:

(1) Does a private shipper have the right to seek and obtain redress from motor common carriers for loss or damage suffered by the shipper as a consequence of the carriers' breach of the duty to render service;

(a) under the common law;

(b) under the statutory sanctions of the Motor Carrier Act (Interstate Commerce Act, Part II) Sections 216(b) and (d)?

(2) Assuming the existence of such a shipper's right of action, do the Federal Courts have jurisdiction thereof either by virtue of diversity of citizenship between the parties or as an action arising under an Act of Congress regulating commerce?

(3) Conversely stated, the foregoing two questions may be summarized as follows:

Did Congress intend by the Motor Carrier Act, to abolish *all* private rights of action in the courts

to recover damages from motor common carriers for breaches of the duties imposed upon them by Sections 216(b) and (d) of that Act and in effect to clothe such carriers with immunity therefrom?

(4) If a shipper has such a right of action, cognizable in the Federal Courts, is the courts' jurisdiction to hear and determine such a cause in any way affected by the fact that the refusal of service was due to the existence of a picket line at the shipper's place of business where

(a) No labor dispute existed between the shipper and the carriers; and

(b) the only defendants or other adversary parties to the litigation were carrier entities; and

(c) the only relief sought by the shipper was damages as against the carrier entities.

Statutes Involved.

Interstate Commerce Act, Section 216(b), (d) and (j); [49 U. S. C. A., Sec. 316(b), (d) and (j)].

"§316. RATES, FARES AND CHARGES—

. . .

"RATES, FACILITIES FOR CARRIERS OF PROPERTY

"(b) It shall be the duty of every common carrier of property by motor vehicle to provide safe and adequate service, equipment, and facilities for the transportation of property in interstate or foreign commerce; to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and

practices relating thereto and to the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, and all other matters relating to or connected with the transportation of property in interstate or foreign commerce.

"UNDUE PREFERENCES OR PREJUDICES PROHBITED

"(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

"EFFECT ON REMEDY OR RIGHT OF ACTION.

"(j) Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith. Feb. 4, 1887, c. 104, Part II, §216, as added Aug. 9, 1935, c. 498, 49 Stat. 558, and amended June 29, 1938, c. 811, §16, 52 Stat. 1240; Sept. 18, 1940, c. 722; Title I, §22(b-d), 54 Stat. 924."

Statement of the Case.

This is an action brought by a shipper against several ICC-certificated motor common carriers seeking money damages for losses suffered as a consequence of the refusal of the carriers to render service, in breach of their duty to do so. Petitioner (plaintiff and appellant below) in its complaint in the first cause alleged the breach by each of the respondent carriers (defendants and appellees below) of their common law and statutory duties to serve petitioner [1 Tr. 4-26].

The alleged breach lay in the failure of the carriers to make pick-ups and deliveries of goods at petitioner's place of business, in response to reasonable requests on the part of petitioner [1 Tr. 6-7].

In the original complaint, petitioner asserted jurisdiction under 28 U. S. C. A., Section 1332, diversity of citizenship, and under Section 1337 on the theory that contained among the various duties enunciated by Sections 216(b) and (d) of the Motor Carrier Act [Interstate Commerce Act, Part II, §316(b) & (d), 49 U. S. C. A. §316(b) & (d)], was a restatement of the common law duty to render service and to serve without

unjust preference or discrimination; that this statutory sanction gives rise to a right of action on the part of shippers for damages occasioned by its breach and that the cause, therefore, arose under an Act of Congress regulating commerce [1 Tr. 4].

Pursuant to appropriate motions to dismiss, the District Court, relying on *Consolidated Freightways v. United Truck Lines* (9th Cir. 1954), 216 F. 2d 543, decided that it did not have jurisdiction to hear and determine the controversy because "... the Motor Carrier Act does not provide *any* private remedy for a violation of *any* of its provisions" (emphasis added) [1 Tr. 94].

The appeal in the first cause was taken from this decision, naming, as appellees, those defendants as as against whom diversity of citizenship could not be shown [1 Tr. 95].[1]

Respondent then filed a first amended complaint (the second cause), bringing in certain additional carrier defendants and renaming those defendants to the original complaint which were not made appellees in the first appeal [2 Tr. 2-2h]; as to all of these, diversity of citizenship was this time alleged both generally *and* specifically [2 Tr. 2a-2d]. Petitioner again asserted jurisdiction on the basis of 28 U. S. C. A., Sections 1332 and 1337, but this time placed equal reliance upon

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[1]"The original complaint was prepared and filed against a large number of defendants under circumstances of urgency, and it was not possible in the time at hand to ascertain the facts regarding the citizenship of all of the various defendants; it contained, therefore, only general allegations of diversity and no factual specifications. As a consequence, the court, on the motion to dismiss, did not reach the question of whether there existed a common law basis of action apart from statutory consideration."

petitioner's common law right of action against a common carrier for breach of the duty to render service, on the theory that this right survived the passage of and existed apart from the Motor Carrier Act [2 Tr. 2a-2b].

Answers, as well as affidavits of various parties, asserted in both causes that the failure or refusal of service was due to the existence of a peaceful picket line at petitioner's place of business [2 Tr. 13, 20, 27, 34, 41, 119, 127-128, 135, 143, 150-151; 46, 78-80, 88-89, 90; 2 Tr. 78-79, 81-82, 84; Court of Appeals Op. p. 2].

Pursuant to motions timely brought, the District Court again dismissed without opinion, for want of jurisdiction over the matter [2 Tr. 192]. From this decision, the second appeal (in 17380) was taken.

Petitioner's basic contentions are, as stated in the opinion of the Court of Appeals, that it, as a shipper, invoked the duty of a common carrier to serve and to render service without unjust preference or discrimination; that the shipper's historic right of action at common law to recover damages in the courts for breach of that duty is in no way inconsistent with any power or exclusivity conferred upon the Interstate Commerce Commission (hereinafter referred to simply as "Commission") under the Motor Carrier Act; that the shipper's cause of action therefore continues in dual form both as a common law right under the savings clause

of the Act [Sec. 216(j); 49 U. S. C. A., Sec. 316(j)], as well as under the statutory sanctions of Sections 216(b) and (d) (49 U. S. C. A., Sec. 316(b) and (d)); and that the Federal Courts have jurisdiction over such actions.

The Court of Appeals, in its opinion, struck down both of these contentions holding that no matter what the basis asserted, the courts are closed to shippers aggrieved by unreasonable disservice or unjust discrimination on the part of motor common carriers for the reason that "whenever under a claim by a shipper that a motor common carrier has failed to serve, there arises a *genuine* issue as to the reasonableness of such disservice or unjustness of such discrimination, there exists no remedy in the courts available to the shipper, for the crucial questions of reasonableness or unjustness cannot be decided by the court". (Court of Appeals Op. p. 4).

A further contention raised in opposition to the position of petitioner below, but not reached by the Court of Appeals because of the particular ground of the holding, was that the District Court was without jurisdiction because the controversy between the parties raised issues within the exclusive primary jurisdiction of the National Labor Relations Board (hereinafter referred to simply as "Board") (Court of Appeals Op. p. 5).

Argument for Allowance of Writ.

As stated above, two general questions of major importance to the transportation and shipping industries, as well as those sectors of the business community dependent upon them, await resolution, if not entirely, then in substantial part, by the ultimate decision in this case.

The first is the question what if any, shippers' damage actions against motor common carriers survived the passage of the Federal Motor Carrier Act. (If the Court of Appeals decision below is literally applied, it will mean the virtual abolition of all such actions.)

The specific point involved in the instant case concerns the question whether a shipper has a right to recover damages for breach of the duty to render service. If, as we believe it must this Court should grant *certiorari* and ultimately hold that a shipper still retains such a right of action, the second major question must then be reached: to what extent is this or any such shipper's right affected by the circumstance that a picket line existed at the shipper's place of business at the times in question? This latter question involves the resolution of a seeming conflict between the national transportation policy and the national labor policy here presented in a context which, we submit, permits of such resolution only by this Court. (*Cf. Carpenters' Union v. Labor Board* (1958), 357 U. S. 93, 110.)

We believe the importance of these questions themselves argues for the issuance of the Writ in this case. However, with specific reference to the criteria enunciated by Rule 19 we discuss the matter further below.

The Decision of the Court of Appeals Below Conflicts With Decisions of Courts of Appeals in Different Circuits as Well as With Decisions of Federal District Courts in Other Circuits on the Same Matter.

The Court of Appeals has held in this case that a private shipper, injured by the failure or refusal of I. C. C.-certificated motor common carriers to serve it, in breach of their duty to do so, has no remedy or right to recover damages against the offending carriers. This is true, the court says, because their exists a genuine issue as to whether the action on the part of the carriers was reasonable or not and the Federal Courts are without jurisdiction to determine this issue since the Commission is the only body vested by Congress with such power. In so deciding, the Court of Appeals cites as governing the decision of this court in *T. I. M. E., Inc. v. United States* (1959), 159 U. S. 464, 3 L. Ed. 2d 952, 79 S. Ct. 904.

(We emphasize that the decision below forecloses a shipper from *any* right to recover damages since the Motor Carrier Act, while vesting the Commission with certain powers over motor carriers, gave it no jurisdiction at all to hear damage claims or award damages. The rule of *T. I. M. E., Inc. v. United States* would of course, deny jurisdiction to a state as well as a Federal Court if applicable. We most earnestly and respectfully submit that it is not.)

The Court of Appeals decision herein is, therefore, in conflict with one Court of Appeals decision involving motor common carriers, *Meier & Pohlman Furniture Co. v. Gibbons* (1956, 8th Cir.) 233 F. 2d 296 (*cert.*

den. 352 U. S. 879), as well as several District Court jurisdictions in other circuits: *Merchandise Warehouse Company v. ABC Freight Forwarding Corp.* (1958, S/D, Indiana—7th Cir.), 165 Fed. Supp. 67; *Quaker State Motor Parts Co. v. Interstate Motor Freight, et al.* (1957, E/D Pennsylvania—3rd Cir.), 148 Fed. Supp. 226, and another Court of Appeals decision involving rail common carriers: *Minneapolis, etc., Railway Co. v. Pacific Gamble-Robinson Co.* (1954, 8th Cir.), 215 F. 2d 126. In all of the foregoing cases, the Courts accepted jurisdiction over, heard and determined such causes.

This latter case is pertinent here, we submit, since the decision in *T. I. M. E., Inc. v. United States, supra,* was based squarely upon a decision involving rail carriers[1] and an interpretation of Part I of the Interstate Commerce Act, notwithstanding the existence in that part of the Act of a section specifically authorizing private damage suits (Interstate Commerce Act, Part I, Sec. 8, 49 U. S. C. A., Sec. 8). In other words if the rule of *T. I. M. E., Inc. v. United States, supra,* operates to bar private shippers actions against motor carriers for damages, it would appear equally to bar such actions against rail carriers.

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[1] *Texas & Pacific Ruy. v. Abilene Cotton Oil* (1906), 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350.

The Opinion of the Court of Appeals Herein Constitutes an Unwarranted Extension and, Therefore, a Misapplication of Decisions of This Court.

We further submit that the opinion of the Court of Appeals herein constitutes an unwarranted extension of the rule in *T.I.M.E., Inc. v. United States, supra.* It represents therefore a decision on a Federal question which conflicts with applicable decisions of this Court.

In *T.I.M.E., Inc. v. United States, supra,* the majority held that a shipper, in post-shipment litigation, could not challenge in the courts the reasonableness of the carrier's charges which were made *in accordance with the tariffs governing a shipment.* In so deciding, the majority invalidated a split procedure which had grown up under the sanction of the Commission, pointing out that the Motor Carrier Act had conferred upon the Commission the exclusive right to fix and determine *rates* and that any challenge to this determination must be presented directly to the Commission and not indirectly through the Courts. As noted above, the decision was based squarely on the authority of this Court's earlier decision in *Texas and Pacific Railway v. Abilene Cotton Oil* (1906), 204 U. S. 426, 51 L. Ed. 553, 27 S. Ct. 350, a landmark decision under the Interstate Commerce Act, Part I, and involving an action brought in a State Court against a rail common carrier.

The court in both decisions simply held that rate determinations made in accordance with Commission-established procedures could not be reviewed and re-

evaluated by individual State or Federal courts, or through that medium, since this would destroy the very uniformity which the Interstate Commerce Act, both Parts I and II, sought to achieve.

It should be borne in mind that each case involved the reasonableness of rates, which the Commission was, by the Congress and the Act, specifically empowered and directed to determine and establish, and what was sought to be questioned or re-evaluated in effect was the reasonableness of action *on the part of the Commission.*

The Court in both cases pointed out, in answer to contrary arguments based on the common law, that any common law causes of action against carriers for the recovery of unreasonable charges must necessarily be superseded and abolished since this necessarily involved the determination of what was and what wasn't a reasonable rate, and the statutory scheme gave this particular power of determination exclusively to the Commission.

These decisions pertain to a specific and clearly defined sector of carrier regulation.

The Court of Appeals decision herein has broadened the rules in those cases, and their consequent application, to exclude from the court's jurisdiction over *any* cause by a shipper against a motor common carrier involving *any* of the duties enunciated in Section 216(b) and (d), [49 U. S. C. A., Secs. 316(b) and (d)], where there is presented for determination *any* question of reasonableness, whether of action on the part of the Commission, a carrier, a carrier's agents or employees, a shipper, or whomsoever.

This is the literal holding of the Court of Appeals below.

We believe that this application of the rule in *T. I. M. E., Inc. v. United States, supra,* beyond the limited area of rate determination to cases involving the duty of service is, in itself, a major and unwarranted extension of that rule (see *Riss v. Association of American Railroads* (1959, D. C.), 178 Fed. Supp. 438). But the decision goes much further, for, if the matter is thought through, it will readily be seen that under this rationale, no shipper could sue a motor common carrier in any court on *any* basis for the reason that no carrier would lack the ingenuity to raise and present for determination at least one pertinent issue involving a determination of the reasonableness or unreasonableness of action on the part of some person or entity in the cause, and arising from or referrable to the duties enunciated in the subject sections.

A few examples will illustrate. It has been generally accepted that shippers continue to enjoy a right of action to recover overcharges from motor common carriers: that is to say, charges at rates in excess of those published in filed and posted tariffs applicable to the particular shipment. *Fawley Motor Lines v. Cavalier Poultry Corp.* (1956), 235 F. 2d 416; *United States v. Yale Transport* (1960), 184 Fed. Supp. 42. Congress assumed such a right to exist and evidently assumed the fact to be so well settled as to require no specific mention by it, since the Congress incorporated in the Motor Carrier Act provisions fixing and affecting the period of limitations within which such suits might be brought, but never felt it necessary elsewhere in the

Act to enunciate or spell out the basic right of action or specifically bestow jurisdiction over such causes on the Federal Courts. Motor Carrier Act, Section 204a(2) *et seq.* [49 U. S. C. A., Sec. 304a(2)].

This would seem to carry with it jurisdiction in the courts to determine which of the lawfully posted tariffs was applicable in the circumstances. See Motor Carrier Act Section 204a(5) [49 U. S. C. A., Sec. 304a(5)].

Nevertheless, under the rule announced below, a carrier can defeat such an action merely by alleging in defense that the charges were made in accordance with the rates posted in a tariff *different* from that alleged to be applicable and that the charges were, therefore *reasonable*. The mere assertion, it appears, is sufficient to defeat jurisdiction and deprive the shipper of recovery. *Hewitt-Robins v. Eastern Freightways* (1961, 2nd Cir.), 293 F. 2d 205 (Certiorari granted, 368 U. S. 915).

We can apply the same rationale to a shipper's action against a carrier for damage to goods in transit. The duty of a motor common carrier to render safe, effective and adequate service certainly has its roots in the same sections of the Motor Carrier Act involved in the cases at bar. The same considerations above described relative to actions for overcharges are equally applicable to actions for damage to goods in transit, or so it would seem if the specific portions of the Motor Carrier Act dealing therewith are considered. See 49 U. S. C. A. Section 319.

Nevertheless, a carrier sued by a shipper for damage to goods in transit would only need, under the rationale of the opinion below, to allege in defense that it acted reasonably under the circumstances and the shipper's action would fall completely for lack of jurisdiction in any court to determine such an issue.

The same argument may be fashioned in any action brought to enforce against a carrier any portion of its contract of carriage or for breach of any of its duties in respect thereof.

Similarly, there is nothing in the language of the court below to restrict its rationale to cases involving causes of action sounding essentially in contract. Causes of action in tort for personal injuries suffered as a consequence of a motor carrier's negligence would certainly be subject to the same rationale: "the shipper acted reasonably under the circumstances". The duty of reasonable care is fundamental to every such action, and again the escape hatch created by the opinion below is presented to the carriers.

We believe it is quite apparent from the foregoing that a host of consequences, neither foreseen nor intended by the majority of this Court in arriving at its decision in *T.I.M.E., Inc. v. United States, supra,* will certainly ensue unless certiorari is granted to review the decision below, to correct this unwarranted and potentially most harmful extension of the rule in that case.

The Opinion of the Court of Appeals Below Has Decided (Erroneously, We Submit) Important Questions of Federal Law Which Have Not Been, but Should Be, Settled by This Court.

From what we have said before, it will be apparent that the instant case presents a number of important questions of federal law which have not been but should be decided by this court. Underlying the specific holding in the Court of Appeal's opinion is the question whether the Motor Carrier Act in effect clothed all federally certificated motor common carriers with immunity from court suits for damages of virtually any kind by restricting jurisdiction over such matters to the Commission (which has no power to award damages in respect of motor carriers).

As we have pointed out above, this question was answered by this court in *T.I.M.E., Inc. v. United States, supra*, as to actions which attempted to question rates already declared, in effect, to be reasonable by the Commission. The extent to which that rule has here been extended, by itself, indicates the necessity for further expression on the matter by this court as well as an expression of which, if any, causes of action survived the passage of the Motor Carrier Act. We do not labor this point at further length, for we believe that the court has already recognized the importance of this question by its action in granting the petition for certiorari to review the decision of the Court of Appeals for the 2nd Circuit in the case of *Hewitt-Robins v. Eastern Freightways, supra.*

The question, it seems apparent, is of immense importance to the nation's transportation industry as well

as those industries served by it for, in the present uncertain state of the law, a shipper is completely at the mercy of chance and the carriers for it cannot know whether it has a remedy at all, or if it does, where it may be presented or what relief may be had. It seems quite clear that if the decision herein is permitted to stand, the shipper will at least know to a reasonable certainty that he is without prospect of redress, without practical hope of compensation for loss by way of damages against the carrier, no matter what the offense. Clearly this situation was never intended by Congress to follow from its enactment of Part II of the Interstate Commerce Act and this court should so declare.

We do not here attempt to argue the merits of this point or set forth the authorities which compel a reversal of this holding. We attempt, merely, to define the question, its importance and the compelling need for its resolution by this court.

Should this court review the opinion of the court below and determine that a shipper does have a right of action for damages in the courts against a motor carrier for refusal to serve (as, we submit, it must) then another question of equal range, importance and impact on the nation's transportation industry and its business community is presented:

> To what extent is the carrier's duty to serve and the shipper's right of action for damages against the carrier for failure to serve affected by the circumstance that the refusal or failure was occasioned by the existence of a picket line at the shipper's place of business.

There are numerous decisions (not of this court) which hold or necessarily imply that such a circumstance does not affect the Federal Court's jurisdiction to hear and determine such a cause.

Meier & Pohlman v. Gibbons, supra;

Merchandise Warehouse Company v. ABC Freight Forwarding Corp., supra;

Quaker City Motor Parts Co. v. Interstate Motor Freight System, supra;

Minneapolis, etc., Railway v. Pacific Gamble Robinson Co., supra.

Certain *per curiam* decisions of this court are sometimes read as implying a contrary rule and holding to the effect that the mere presence of a picket line would relegate the entire matter to the exclusive province of the National Labor Relations Board (hereinafter referred to simply as "Board") regardless of the nature of the case, the context of the controversy, the parties involved, the relief sought or the circumstances attending or compelling the failure or refusal to serve, as was urged below by appellees.

General Drivers, etc. v. American Tobacco Co. (1959), 348 U. S. 978, 99 L. Ed. 762, 75 S. Ct. 569;

Teamsters v. Kerrigan Iron Works (1957), 353 U. S. 968, 1 L. Ed. 2d 1133, 77 S. Ct. 1005 (reversing 296 S. W. 2d 379);

McCrary, et al. v. Aladdin Radio Industries, Inc. (1957), 355 U. S. 8, 2 L. Ed. 2d 22, 78 S. Ct. 12 (remanding 298 S. W. 2d 770);

Bogle v. Jakes Foundry Co. (1960), 362 U. S. 401, 4 L. Ed. 864, 80 S. Ct. 12 (reversing in part 329 S. W. 2d 364).

These decisions were all in actions involving injunctive relief or citations for contempt or both and were all concerned with the rights of union defendants or individual defendant union officers, agents, employees or members.

In the causes at bar, the only defendants involved are carrier entities and the only relief sought is money damages against these defendants.

The instant case, therefore presents to this court for the first time the possibility of determining, without regard to extraneous matters and issues, the question of a Federal Court's jurisdiction to determine a shipper's right and a common carrier's duties in respect of one another in this critical situation.

The uncertainty of the law in this same situation, the need for its clarification as well as the dilemma in which shipper and carrier alike presently find themselves is well summarized by one writer, writing in both the Transportation Journal and the Labor Law Journal. See Labor Law Journal (C. C. H.) April 1962, "Carrier Service and the Picket Line: A Dilemma", page 301; Transportation Journal (American Society of Traffic and Transportation), Volume 1, No. 3, Spring 1962, "Carrier Service and the Picket Line," page 14.

Conclusion.

We believe it is evident from the foregoing that the circumstances of the within causes, the importance of the questions involved, the uncertain state of the law on the subject matter (an uncertainty which has been compounded by the opinion below), compel the granting of the within Petition and the issuance of the Writ, as prayed.

Respectfully submitted,

HILL, FARRER & BURRILL,
By CARL M. GOULD,
Attorneys for Petitioner.

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Pensick & Gordon, Inc., Appellant, vs. California Motor Express, *et al.*, Appellees. No. 17,235.

Pensick & Gordon, Inc., a California corporation, Appellant, vs. California Motor Express, Limited, a corporation, *et al.*, Appellees. No. 17,380. April 13, 1962.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes and Jertberg, Circuit Judges; and Pence, District Judge.

Pence, District Judge:

This is an action for money damages brought by shipper against several motor common carrier defendants. The shipper (Appellant), in its original complaint (App. No. 17235) alleged the breach by each of the common carriers (Appellees) of their statutory duty to serve the appellant under the Motor Carrier Act (hereinafter referred to as "MCA"), part II of the Interstate Commerce Act, Section 216 (b) and (d), (49 U. S. C. A., Sections 316 (b) and (d)).[1] The

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[1]Section 216 of the MCA (49 U. S. C. A. §316) reads, in pertinent part, as follows:

"(b). It shall be the duty of every common carrier of property by motor vehicle to provide . . . adequate service, to establish . . . just and reasonable . . . practices relating . . . to the manner and method of delivering property for transportation . . .", and "(d). It shall be unlawful for any common carrier by motor vehicle . . . to subject any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage."

breach alleged was failure of the appellees to pick up and make delivery of goods at appellant's place of business, upon reasonable terms and without unjust discrimination.

In the original complaint, appellant asserted jurisdiction as to all appellees under 28 U.S.C.A. 1337, on the theory that the MCA gave a shipper the right under the Commerce clause to bring an action for damages in the United States District Court for breach by motor common carriers of their statutory duty to serve shippers and to serve without discrimination. The District Court, relying on Consolidated Freightways v. United Trucklines, (9 Cir., 1954), 216 F2d 543, decided that it did not have jurisdiction to hear and determine the controversy because the MCA does not provide any private remedy for a violation of any of its provisions, from which decision the appeal in No. 17235 was taken.

Appellant filed an amended complaint, again asserting jurisdiction lay in the District Court as to all appellees by virtue of the same 28 U.S.C.A. 1337, and also asserted jurisdiction on the premise that there exists a common law right of court action to enforce the common law duty of common carriers to serve and to serve without discrimination, apart from the statute, which common law rights survived the passage of the MCA, and that since diversity existed as to some of the appellees, jurisdiction lay in the District Court by virtue of 28 U.S.C.A. 1332.

Answers, as well as affidavits filed by all parties clearly showed that the failure to serve and the discrimination complained against resulted from the re-

fusal of appellees' unionized drivers to cross a picket line thrown up around appellant's place of business by appellant's employees as a result of a strike at appellant's plant. In determining the existence or non-existence of the requisite jurisdictional facts, the District Court properly inquired into and weighed all answers and affidavits. *Williams v. Minnesota Mining and Manufacturing Company*, 14 FRD 1, 4-8, SDCal. 1953, and *Ramirez and Feraud Chili Company v. Las Palmas Food Company*, 146 F.Supp. 594, AFFD, 245 F2d 874 (9 Cir. 1957), Cert. Den. 355 US 927, 1958.

From a ruling by the District Court that still it was without jurisdiction to try appellant's amended complaint, a second appeal, No. 17380, was taken. Both appeals, No. 17235 and No. 17380, were joined for the purpose of argument and disposition.

Appellant's basic contentions are that it, as a shipper, has invoked the common law duty of a common carrier to serve; that the shipper's historic right of action for breach of that duty is in no way inconsistent with any power exclusively conferred upon the Interstate Commerce Commission under the MCA; and that the shipper's cause of action continues in dual form both as a common law right under the savings clause of the Act, 216 (j) (49 U.S.C.A. 316 (j)) as well as the statutory sanctions of Section 216 (b) and (d).

Since the facts as shown by the complaints, answers and affidavits clearly demonstrate that the alleged breach of duty of service arose out of the failure of the defendants to serve because of appellant's own labor dispute and appellees' employees' refusal to cross the appellant's union's picket line at appellant's plant,

the alleged breach, by the very nature of those facts, depends upon the element of reasonableness or unreasonableness of the acts of appellees' employees in so refusing to cross the picket line. This, per se, demands the factual determination as to whether or not the carrier failed to provide reasonable service without unjust discrimination, as delineated in part II of the MCA, Sections 216 (b) and (d). The question of jurisdiction is thereby brought squarely within the purview of *T.I.M.E. v. United States,* 359 U. S. 464, 3 L. Ed. 2d 952, 79 S. Ct. 904, and *Consolidated Freightways v. United Truck Lines, supra,* and the rationale of those cases is directly applicable here.

The legislative history of the MCA is fully covered in *T.I.M.E., supra,* and *Consolidated Freightways v. United Truck Lines,* 216 Ore. 516, 330 P. 2d 522, cert. den. 355 U. S. 1001. It is clear from that history that the MCA undertook to set forth a comprehensive and all-inclusive scheme for the Federal regulation of common motor carriers. As heretofore indicated, Section 216 as it applies to the instant case, provides that carriers may not unreasonably refuse to serve or unjustly discriminate against any shipper. Therefore, in every case in which the problem of carrier compliance with the service or discrimination clauses of Section 216 of the MCA is raised, there must be a determination by the Commission of whether there has been a disservice or discrimination with respect to treatment of shippers, and whether such treatment was un-

reasonable or unjustly discriminatory. "Whether a carrier has without justification failed to provide reasonable and nondiscriminatory service is a question of defining the carrier's duty in the framework of the National Transportation Policy." *Carpenters' Union v. Labor Board*, 357 U. S. 93, 110, and only the Commission can answer that question.

Under the statutory scheme of the MCA, only the ICC can decide in the first instance whether any alleged act of disservice on the part of the appellees was unreasonable or unjustly discriminatory and the courts are without authority to make such a determination. If, under the saving clause, §216 (j) of the MCA, no common law remedy is saved to a shipper, aggrieved by an unreasonable rate, which was held in T.I.M.E. to be an administrative question, no such remedy is saved to a shipper aggrieved by unreasonable disservice or unjust discrimination, which also is an administrative question, as held in *Carpenters' Union, v. Labor Board, supra*. Whenever, under a claim by a shipper that a motor common carrier has failed to serve, there arises a *genuine* issue as to the reasonableness of such disservice or unjustness of such discrimination, there exists no remedy in the courts available to the shipper, for the crucial questions of reasonableness or unjustness cannot be decided by the courts.

It is not necessary for us to decide, and we do not so decide, that no common law actions have survived the

MCA, but where, as appellant recognized here,[2] the real issue is whether or not the carrier has failed to provide service to a shipper on reasonable terms and without unjust discrimination, the District Court is without jurisdiction to hear and determine it.

Having decided these appeals on the above grounds, we do not find it necessary to pass upon the merits of appellees' affirmative defense that the District Court was without jurisdiction because the controversy between the parties raised issues which are within the exclusive primary jurisdiction of the National Labor Relations Board.

As to each appeal, we hold the District Court correctly dismissed each complaint for lack of jurisdiction.

Affirmed.

(Endorsed) Opinion Filed April 13, 1962.

Frank H. Schmid, Clerk.

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[2] "The gist of the action is the failure of the Defendants individually, at specified times, to provide service to the Plaintiff upon reasonable terms and without discrimination."
Ap. No. 17235, Apnt. Op. Br., p. 1.

"This cause is the companion to that in Ap. No. 17235. . . . The theories of the first and second causes are identical."
Ap. No. 17380, Apnt. Op. Br., p. 1, 2.

"Sec. 216(b) and (d) of the Motor Carrier Act . . . contains . . . a statutory embodiment of this . . . (common law duty of a common carrier to serve).

"The commission has further refined the general standards laid down by the statute . . .

"The foregoing are the standards by which the conduct of the Appellees must be measured, and this Appellant does not question the standards; it seeks only to establish a failure to conform to them . . ."
Aps. No. 17235, No. 17380, Apnt. Reply Br., p. 3.